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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 476

FRITZ VON OPEL, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 37) is reported at 133 F. Supp. 615. Two pretrial opinions of the District Court (R. 21, 34) are reported at 121 F. Supp. 420 and 127 F. Supp. 42. The opinion of the Court of Appeals (Pet. App. 1a) is reported at 244 F. 2d 789.

JURISDICTION

The judgment of the Court of Appeals was entered on May 23, 1957. A petition for rehearing was filed on June 7, 1957 and was denied on June 20, 1957. The petition for a writ of certiorari was filed on September

18, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, the alleged beneficial owner of all of the stock and the legal owner of 97 per cent of the stock of Uebersee Finanz-Korporation, A. G., which has been adjudged to be enemy tainted by reason of enemy ownership and control of 97 per cent of the stock, is an innocent stockholder entitled to recover herein under the decision of this Court in *Kaufman* v. *Societe Internationale*, 343 U.S. 156.

2. Whether the principles of *res judicata* were properly applied in relation to various determinations made in prior litigation which was controlled by petitioner and in which he had a proprietary or financial interest.

3. Whether, during the war, petitioner was resident outside the United States and did business within enemy territory.

4. Whether petitioner was also barred from recovery under Section 9(a) of the Trading with the Enemy Act because he acted for and on behalf of, and as an agent of, enemy nationals.

STATUTE INVOLVED

The relevant provisions of Section 2 of the Trading with the Enemy Act are set forth in the petition (pp. 3-4). The provisions of Section 9(a) of the Trading with the Enemy Act are printed in the Appendix, *infra*, p. 29.

STATEMENT

This action was originally brought under Section 9(a) of the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. Secs. 1-39) by Uebersee

Finanz-Korporation, A.G., a Swiss corporation, to recover certain property which had been vested by the Alien Property Custodian [1] in 1942.

On a motion to dismiss the complaint, this Court held that the mere fact that Uebersee was incorporated in Switzerland was not a ground for dismissal, but that it could recover only if it established that it was free of enemy taint. *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480. Upon remand, the District Court for the District of Columbia, after extended trial, entered judgment for the Government together with findings of fact and conclusions of law (R. 60-71). It also filed an opinion which is reported at 82 F. Supp. 602. In the District Court there was no dispute as to the ownership of the property vested; the sole question presented was whether Uebersee was owned or controlled by enemies and was thus itself an enemy within the meaning of this Court's prior decision. Uebersee contended that Fritz von Opel held legal title to 97 of its 100 shares and was the beneficial owner of all of its shares; that Fritz von Opel was not an enemy; and that consequently Uebersee was not an enemy. The Government contended, and the District Court found, that control and substantial beneficial ownership of Uebersee were held by Wilhelm and Marta von Opel, the parents of Fritz von Opel, who were citizens and residents of Germany and enemies under the Trading with the Enemy Act. The District Court held that this

[1] The functions of the Alien Property Custodian were transferred to the Attorney General by Executive Order 9788, October 15, 1946, 11 F.R. 11981. The action was originally brought against James E. Markham, as Alien Property Custodian. Tom C. Clark, Attorney General, was later substituted and timely substitutions of his successors in office have been made.

ownership and control by enemies constituted enemy taint of Uebersee within the meaning of this Court's prior decision and that the circumstances surrounding Fritz von Opel's acquisition of Liechenstein citizenship and his attachment to and sympathy for Germany, as well as Uebersee's ownership of Transdanubia Bauxite A. G., a Hungarian corporation mining bauxite for shipment to Germany, were additional elements of enemy taint. The judgment of the District Court was affirmed by the Court of Appeals (196 F. 2d 557) and this Court affirmed unanimously (343 U.S. 205). The judgment so affirmed rested briefly on the following facts:

In 1931, Wilhelm and Marta von Opel owned 600 shares, or 10 per cent, of the stock of Adam Opel A.G., a German automobile manufacturing corporation, control of which had been acquired by General Motors Corporation two years earlier (Fdgs. 12, 17; R. 62). In order to be able to obtain payment for these shares in gold or American currency, as provided by an agreement with General Motors (instead of in Reichsmarks, as required by then applicable German foreign exchange laws), it was thought desirable to transfer such shares to a non-resident of Germany (Fdgs. 12-16, 18, R. 62, 63). Since Fritz von Opel, after 1929, had ceased to be a resident of Germany and had become a Swiss domiciliary (Fdg. 6, R. 60), Wilhelm and Marta von Opel, on October 5, 1931, executed in Germany a deed of gift to Fritz von Opel transferring such shares to him (Fdg. 17, R. 62). The deed of gift provided, however, that the usufruct in the shares or any property received in exchange therefor was reserved to Wilhelm and Marta von Opel and that 20 per cent of the dividends received should accrue to Fritz von Opel (Pl.

Ex. 5, Pet. App. 11a). Shortly thereafter, Fritz von Opel, acting as attorney in fact for his father, sold the 600 Opel shares to General Motors Corporation for American currency and securities, acquired the shares of Uebersee and transferred to it the proceeds of the sale to General Motors (Fdgs. 20-21, R. 63). Under German law, possession or co-possession of the usufruct property must be delivered to the usufructuary by the owner (Fdg. 34, R. 65). This was accomplished in or about 1935 when Fritz von Opel placed 97 shares of Uebersee in a safe deposit box in Switzerland and delivered the key to one Hans Frankenberg as agent for Wilhelm von Opel (Fdgs. 37, 38, 42, R. 66, 67). Under German law, a usufruct is an *in rem* right in property and the usufructuary has the right not only to co-possession, but to the enjoyment of the property and to the income, to a voice in the management, a right to prevent disposition of the property and, in the case of shares, possibly the right to vote such shares (Fdg. 52, R. 69).

The gift agreement, however, did not reflect the entire agreement between the parties. Mr. Frankenberg was made managing director of Uebersee at the request of Wilhelm von Opel (Fdg. 39, R. 66) and controlled the major policies of the corporation until its property was vested in 1942 (Fdgs. 40, 43, R. 66, 67). His activities as managing director were at all times as agent for Wilhelm von Opel (Fdgs. 41, 43, R. 67), and the activities of Fritz von Opel were also under the direction of either Wilhelm von Opel or Frankenberg (Fdgs. 44, 45, R. 67, 68). Thus, the rights of possession, management and disposition of the usufruct property were conferred exclusively on Wilhelm von Opel or his agent. Petitioner himself so represented the

facts in litigation instituted against the Federal Reserve Bank of New York to recover possession of $1,250,000 in gold purchased by Uebersee in 1933 (*Uebersee Finanz-Korporation, A.G.*, v. *Rosen*, 83 F. 2d 225 (C.A. 2), certiorari denied, 298 U.S. 679), in which he stated that "naked legal title only to the shares was transferred" to him (Def. Ex. 8, Former R. 2000;[2] Fdgs. 47-50, R. 68).

The District Court also found further evidence of enemy taint in the ownership by Uebersee of all of the stock of Transdanubia Bauxite A.G., a Hungarian corporation which mined bauxite and shipped it to Germany during the war (82 F. Supp. 606; Fdgs. 22-31, R. 63-65). Petitioner made several trips to Hungary in 1939 to expedite such bauxite production, and as a result of negotiations carried on by him Transdanubia Bauxite agreed to deliver 100,000 tons of bauxite to a German purchaser in 1940, 1941 and 1942 (Former R. 893, 894; Def. Exs. 76, 93, 95, Former R. 2262, 2286, 2288; Fdg. 31, R. 65).

Since the case had been presented in a manner which indicated that the interests of several persons were involved, one of whom was allegedly a neutral, the District Court deemed it appropriate to inquire into "possible enemy tendencies of the neutral" (82 F. Supp. 606). It found that, although petitioner spent a large portion of his time outside of Germany after 1929, his roots remained firmly planted in that country and not until November 1939 did he attempt to change his citizenship (82 F. Supp. 606). He acquired Liech-

[2] The Record on Appeal of these prior proceedings has been redesignated by the parties as part of the Record in the present appellate proceedings. References to the prior Record on Appeal (No. 178, October Term 1951) are designated as "Former R.".

tenstein citizenship at that time by paying $10,000 and obtaining a waiver of the residence requirements provided by law. This was necessary since he had never been in the country for more than a few hours (Fdgs. 7, 8, 9, R. 61; 82 F. Supp. 606). The District Court therefore concluded that his neutral citizenship was a mere "technical form", that his statements and actions between 1939 and 1941, including his willingness to expedite bauxite production for the German war economy, demonstrated a continued interest in the welfare of Germany, and that consequently the neutral aspect of ownership was insignificant (82 F. Supp. 606).

In unanimously affirming the judgments of the District Court and the Court of Appeals, this Court described these facts as follows:

> However, from the facts found, it is clear that petitioner for all practical purposes was, to the extent of 97%, largely owned, managed, used, and controlled by Wilhelm von Opel, a national of Germany. The findings demonstrate that petitioner was a corporate holding company acquired for the purpose of enabling Wilhelm to control and use his property as he saw fit. His interest was paramount and controlling. * * * Petitioner was neutral in name only. Its enemy taint was all but complete because of the predominant influence and control of Wilhelm. Wilhelm had and used the substance, while Fritz had the bare legal title; and such right as this gave Fritz, he exercised or failed to exercise in complete subordination to the will of his father. * * *
>
> * * * * * *

> As the District Court said, it would be difficult "to find a stronger case of enemy taint in vested property short of full ownership by an enemy than exists in this case. The neutral aspect of ownership in the property is insignificant * * *." [343 U.S. 211, 212.]

When the case was before this Court at that time, representations were made by the then petitioner, Uebersee, that Fritz von Opel had a fractional interest in the property in suit which had not been considered by the courts below. Accordingly, this Court, while affirming the judgment against Uebersee, vacated the judgment and remanded the case to the District Court for consideration of the rights of Fritz von Opel in the light of its holding in *Kaufman* v. *Societe Internationale*, 343 U.S. 156, announced the same day, that an innocent stockholder in a neutral corporation had an interest in the vested assets of such corporation which he could assert in an action brought under Section 9(a) of the Trading with the Enemy Act. Upon remand, petitioner was permitted to intervene as a party plaintiff, and he alleged that he was the beneficial owner of all of the shares of Uebersee and was not an enemy (R. 4-5). Respondent denied the material allegations in the complaint in intervention and pleaded as a separate defense that petitioner was bound by the prior decisions in this action upon the ground that he had controlled the prior litigation on behalf of Uebersee and had an interest therein (R. 7-8).

The issue raised by this separate defense was presented to the District Court for consideration by a pretrial motion. It was undisputed that petitioner had controlled the prior litigation by retaining counsel, by

assisting in pretrial and trial proceedings, by appearing as Uebersee's principal witness and by authorizing prosecution of an appeal as Uebersee's representative. The District Court concluded that petitioner had controlled and participated in the prior litigation in aid of his own proprietary and financial interest and was thus in privity with Uebersee. It held that the principles of *res judicata* were thus applicable to issues previously determined, but permitted both parties to introduce additional evidence on petitioner's enemy status, enemy taint and the value of his severable interest in the property (121 F. Supp. 420, R. 21, 32). On a subsequent pretrial motion, the District Court concluded that the same principles were applicable in determining which law should govern the evaluation of petitioner's interest in the property. Since it had previously been determined that German law was applicable in determining the rights of the parties to the gift agreement, this determination of choice of law was binding upon petitioner, thereby precluding him from seeking to apply Swiss law as he then urged (127 F. Supp. 42, R. 34, 36).

The action again proceeded to trial, and at the conclusion thereof the District Court filed its opinion (133 F. Supp. 615, R. 37) and findings of fact and conclusions of law (R. 72).[3] These findings and conclusions may be summarized as follows:

1. Petitioner had entered the United States in 1940 under a visitor's visa permitting him to remain for six months, and this visa was extended for additional six

[3] For convenience of reference, the additional findings of fact and conclusions of law are numbered to follow those made at the conclusion of the first trial.

month periods until February, 1942 when he was interned as an enemy alien (Fdgs. 57, 58, R. 72). He never immigrated into the United States, although he had opportunities to do so and his wife did so in 1941 (Fdg. 61, R. 73). His Liechtenstein citizenship was one of convenience, without attachment to that country (Fdg. 62, R. 73), and his activities in the years preceding the war were largely devoted to furthering investments and business activities of his father in Germany (Fdg. 60, 76, R. 72, 76). He was thus present in the United States after 1940 only as a visitor, transient or sojourner, was not a resident of the United States and was resident outside the United States (Fdg. 63, R. 73; Concl. 10, R. 86).

From 1935 through 1941, petitioner managed and controlled the affairs of Transdanubia Bauxite A.G., the Hungarian subsidiary of Uebersee previously mentioned (Fdg. 65, R. 73). This was accomplished by numerous trips to Hungary through November, 1939, and by petitioner's appointment of agents to represent him in conducting the affairs of the Hungarian corporation (Fdg. 66, R. 74). In the summer of 1939, petitioner appointed an agent to control the management and operations of Transdanubia Bauxite A.G. by delivering to him powers of attorney authorizing the agent to represent petitioner and to sign in petitioner's name for Transdanubia Bauxite A.G. (Fdgs. 67-69, R. 74). These powers of attorney were never revoked, and petitioner's agent regularly reported to him on the status of operations in Hungary (Fdgs. 70, 71, R. 75). In November, 1939, petitioner went to Hungary in response to a request from the German purchaser of bauxite that he perform "meritorious service for the raw material supply of the German aluminum industry

and the entire war economy of Germany" by expediting production (Fdg. 72, R. 75). On this trip, he negotiated the contract providing for the delivery of bauxite to Germany through the year 1942, and the Court found that shipments were made during December, 1941, and inferred from the evidence that they continued as required by that contract (Fdgs. 72, 73, R. 75). It was concluded that petitioner's relationship to Transdanubia Bauxite A.G. was more direct than that of Uebersee; that the acts of the agent appointed by petitioner were attributable to him; and that he was thus resident outside the United States and doing business within enemy territory (133 F. Supp. 620, R. 43; Concl. 10, R. 86).

2. With respect to the question of petitioner's status under this Court's decision in *Kaufman* v. *Societe Internationale, supra,* the District Court concluded that petitioner was not an innocent stockholder in view of the prior findings made and in view of this Court's earlier decision that the property was "owned, managed, used and controlled" by Wilhelm von Opel and that petitioner's interest was subordinate to that of Wilhelm. Petitioner, unlike Kaufman, was not a mere innocent investor with interests hostile to the management, but rather held his interest for and on behalf of enemy nationals (133 F. Supp. 622, R. 47-48; Concl. 12, R. 87).

3. The evidence showed that between the years 1934 and 1939 petitioner was active in managing business enterprises in Germany which were owned or controlled by his father (Fdgs. 60, 76, R. 72, 76). As his father's representative, he supervised the operations of Collet & Engelhard Machine Tool Factory, Inc. of Offenbach, Germany, Machine Factory Wiesbaden, Inc. of Wies-

baden, Germany, the Wilhelm von Opel Property Administration Company and the Wilhelm von Opel Forest Administration Company. This supervision included the employment of personnel, the fixing of their compensation, major purchases and expenditures and the expansion of production facilities (Fdgs. 77-84, R. 76-78). Petitioner, in 1935, also urged his father to make a large investment in German securities in order to demonstrate that he and his father were willing to act in the interest of the German government at any time (Fdg. 86, R. 79).

More significant, however, were petitioner's activities in September, October and November, 1939, after the outbreak of war in Europe. Petitioner became concerned that the United States might enter the war and seize the assets of Uebersee involved in this action (Fdg. 88, R. 79). He therefore instructed his Berlin attorney to undertake negotiations with German officials in Berlin to the end that he might be permitted to acquire a neutral citizenship for the duration of the war, with the assurance that he could reacquire his German citizenship as soon as the war terminated, thus protecting the American investments (Fdg. 89, R. 80). Having been informed by his attorney that such negotiations should be conducted with German diplomatic officials in Switzerland, petitioner communicated with Mr. von Bibra, Counselor of the German Legation in Switzerland and leader of the German Nazi Party in that country (Fdg. 90, R. 80). In a letter to von Bibra in October, 1939 petitioner, referring to the American investments, succinctly stated his position as follows:

> * * * my lawyers are unanimously of the opinion that the safeguarding and cloaking measures taken

> will certainly not hold up for any length of time vis-a-vis the very thoroughly informed *American* authorities and that a seizure can be avoided only by my taking timely precautions which would permit me to acquire a neutral citizenship in an emergency. (Italics in original.) (Int. Ex. 6, R. 824; Fdg. 91, R. 80)

He therefore proposed that he be permitted to relinquish German citizenship for the duration of the war in order to perserve the assets of Uebersee for the benefit of the German government and to prevent their seizure by the United States, and requested assurance that his German citizenship would be restored upon termination of the war (Fdg. 91, R. 80). In November, 1939, petitioner was informed by von Bibra that in view of petitioner's broad offer of services to the German government and in view of his unequivocal statement that the proposal to acquire neutral citizenship was solely for the purpose of preserving the American assets for the benefit of Germany, the necessary permission to acquire neutral citizenship was granted and was made a matter of official record (Fdgs. 92, 93, R. 81). Petitioner became a citizen of Liechtenstein on November 21, 1939 (Fdg. 7, R. 61).

Petitioner's readiness to perform services for Germany was evidenced by the fact that von Bibra, on September 1, 1939, had been requested by the German Foreign Office to furnish the names of trustworthy Swiss citizens who could make foreign exchange available to Germany in the event of war. Petitioner promptly supplied the name of Dr. Wehrli, a Swiss banker, as a person who could be relied upon for assistance (Fdg. 94, R. 82). It also appears that, in February, 1941, the

German Consulate in New York received a telegram through diplomatic channels from petitioner's father, which requested petitioner to negotiate with General Motors Corporation concerning a possible repurchase of the stock of Adam Opel, A.G. Petitioner advised the German Consulate that he could not undertake such negotiations in the United States without registering as an agent of a foreign government since such transaction could not be consummated without the approval of the German government. He suggested, however, that the Consulate advise his father that he (Fritz) would have to register as a foreign agent and that he was ready to conduct negotiations (Fdgs. 95-96, R. 82).[4]

In the light of this evidence concerning petitioner's activities in behalf of the German government, German nationals and German enterprises, as well as petitioner's efforts to expedite bauxite production in Hungary for shipment to Germany, the District Court concluded that petitioner was an agent of the enemy and enemy nationals, and that he was therefore enemy tainted and an enemy within the meaning of the Trading with the Enemy Act (133 F. Supp. 625, R. 54; Concl. 11, R. 86). It rejected petitioner's contention that the concept of enemy taint was inapplicable to individuals, holding that such a construction would frustrate the intent of Congress as expressed in the amendment to Section 5(b) of the Act contained in the First War Powers Act, 1941, (55 Stat. 838). In the District Court's view, the opinion of this Court in *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, had made it clear that this amend-

[4] These negotiations proved fruitless, since petitioner immediately conferred with officials of General Motors and was advised that the latter had no intention of selling the shares of Adam Opel, A.G. (Fdg. 97, R. 83).

ment was designed to afford flexible powers to deal with those who were giving aid or comfort to the enemy or who were acting on its behalf or contributing to its resources (133 F. Supp. 620-621, R. 44-46).

In order that the record might be complete, the District Court also received evidence and made findings as to the value of petitioner's interest in the property under the usufruct agreement. It found that, upon termination of the usufruct upon the death of petitioner's parents, petitioner was entitled to full beneficial ownership of the property remaining and, during the existence of the usufruct, petitioner had a claim for 20 per cent of the income received by his parents (133 F. Supp. 626, R. 55-58; Fdg. 103, R. 84; Concl. 13, R. 87). As a result of the expert evidence on German law adduced by both parties, the District Court concluded that, during the life of the usufruct, petitioner's interest was of no value in view of the rights of possession, control and disposition exercised by petitioner's parents (Fdgs. 101-102, R. 84; Concl. 14, R. 87). His future interest, however, has a present value which under German law would be computed by analogy to the method of ascertaining the value of annuities and life interests, using German life expectancy tables and taking into consideration the intention of the parties (Fdgs. 104-105, R. 84-85; Concl. 14, R. 87).

With respect to petitioner's right to 20 per cent of the income, it was noted that the Court of Appeals, in response to Uebersee's request for clarification of its opinion on the prior appeal, had held that this right was a mere contract claim existing in favor of petitioner against his parents and was not a property interest (196 F. 2d 560; 133 F. Supp. 627, R. 58-59). Considering itself bound by that holding, the District Court concluded

that petitioner's right to 20 per cent of the income had no value (Concl. 13, R. 87).

In affirming the judgment, the Court of Appeals considered only petitioner's status as an innocent stockholder and deemed it unnecessary to review the findings of the District Court as to petitioner's enemy status (244 F. 2d 792, 793). It was the view of the Court of Appeals that there were important factual differences between petitioner's status and that of the intervenors in *Kaufman* v. *Societe Internationale, supra.* Unlike the situation in *Kaufman,* the taint of Uebersee came to the corporation through the shares of which petitioner was the legal owner and he was part and parcel of the means by which enemy control of Uebersee was secured. As an active participant in the arrangements for executing enemy control, petitioner could not be deemed an innocent stockholder and was thus not entitled to recover (244 F. 2d 791-792). In reaching this conclusion, the Court of Appeals expressly affirmed the determination of the District Court that the principles of *res judicata* were applicable in this action, since petitioner controlled the prior litigation in which he had a financial interest (244 F. 2d 792-793).

ARGUMENT

Ignoring the abundant evidence upon which the decisions below are based, petitioner seeks to formulate questions of law which he urges this Court to review. An examination of the findings summarized above quickly discloses that the questions so formulated are insubstantial, that this case rests peculiarly on its own facts, and that it presents no important question deserving review by this Court.

1. Contrary to petitioner's assertions, the decisions

below in no way conflict with the decision of this Court in *Kaufman* v. *Societe Internationale, supra,* and do not present any important question as to the proper construction of that decision. In *Kaufman,* this Court was confronted with the problem of a minority stockholder who was innocent of any connection with the allegedly dominant enemy management and control of the Swiss corporation in which he held his shares. Recognizing that enemy ownership and control could justify the seizure of all of the assets of such corporation (*Clark* v. *Uebersee Finanz-Korporation, supra*), this Court addressed itself to "the plight of innocent stockholders" (343 U.S. 159) and held that such an innocent stockholder should not be penalized because of the existence of dominant enemy ownership and control, but was entitled to recover a share of the vested assets proportionate to his stock holdings (343 U.S. 159-160).

Petitioner's position, however, is the direct opposite of the facts posited in *Kaufman*. Petitioner assertedly is the beneficial owner of all of the shares of Uebersee and the legal owner of 97 out of 100. He is, therefore, contending that as beneficial owner of all the stock he is nonetheless an innocent stockholder in Uebersee, a corporation which has been determined by this Court to be enemy tainted by enemy ownership and control of the same shares. The very statement of petitioner's position demonstrates its difficulties, for in order to recover herein petitioner must, like *Kaufman,* prove that he is in truth innocent of any connection with the dominant enemy ownership or control of his corporation.

Petitioner, however, was, as the Court of Appeals stated, "part and parcel" of the means by which enemy

control was secured (244 F. 2d 792). Uebersee, as this Court determined, was a holding company acquired to enable Wilhelm von Opel to control and use his property as he saw fit (343 U.S. 211). This could not have been accomplished without the assistance of petitioner or someone in his position. Under the German foreign exchange laws existing in and after 1931, Wilhelm von Opel was required to report and surrender all holdings in foreign currencies or foreign securities. He could not, therefore, acquire a Swiss company such as Uebersee in his own name. He achieved his purpose, however, by transferring title to the property in question to petitioner, a non-resident of Germany not subject to the foreign exchange laws, and by reserving a personal and inalienable usufruct under which he could exercise full powers of control and disposition. Petitioner was thus the conduit through which Wilhelm von Opel was enabled to hold and manage property outside of Germany.[5] Petitioner, in addition, was not an unwitting participant in these affairs. He engaged in various activities on behalf of Uebersee, including the stimulation of bauxite production in Hungary under the guidance and direction of his father or his father's agent; he supervised the litigation concerning the gold purchased by Uebersee in 1933 (*Uebersee Finanz-Korporation, A.G.* v. *Rosen, supra*), and represented therein

[5] Petitioner asserts (pp. 18-19) that he objected to the reservation of the usufruct. The evidence shows, however, that he personally consulted with German attorneys concerning preparation of the agreement (Former R. 323, 410, 590), that he did not object to the appointment of Frankenberg, his father's agent, as managing director of Uebersee (Fdg. 39, R. 66), and that, in or about 1935, he established the usufruct by delivering to Frankenberg the key to the safe deposit box in which the shares were kept (Fdgs. 37, 38, R. 66).

that he held mere naked legal title, with the beneficial ownership and control held by his father; he controlled the litigation conducted by Uebersee for the recovery of its property and was its chief witness therein, asserting that there was no usufruct and that he was the sole beneficial owner of the stock. As this Court found, petitioner's interest was wholly subordinated to that of his father (343 U.S. 211).

Petitioner, then, unlike the *Kaufman* shareholders, provided the means whereby enemy ownership and control of American assets was effectuated and maintained. He was not innocent of such enemy management, but carried on all his activities under such management and subordinated his own interests thereto. Petitioner was thus not an innocent stockholder and can assert no rights of recovery under this Court's decision in *Kaufman* v. *Societe Internationale, supra.*[6] A contrary conclusion would render this entire litigation futile. If petitioner were to recover all or a substantial part of the vested assets of Uebersee, he would still hold them subject to the usufruct which has never been terminated. His mother is still alive and could require the re-establishment of such usufruct and thus achieve a complete return to enemies of the same property which this Court determined Uebersee could not recover because of the same enemy ownership and control.

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[6] Petitioner contends, (pp. 11-12) that this Court's decision in *Kaufman* is applicable to all non-enemy stockholders. This argument ignores the extended discussion of the plight of innocent stockholders in the first part of the Court's opinion. Moreover, if that is all this Court meant to hold, a major portion of its opinion became unnecessary. Since only non-enemies may recover under Section 9(a) of the Trading with the Enemy Act, the use of the term "innocent" would have no significance.

2. Petitioner asserts that the principles of *res judicata* were incorrectly applied by the Courts below. It is, of course, well settled that the doctrine of *res judicata* is applicable to parties to prior litigation and to persons in privity with them. It is no longer open to question that persons who are not parties, but who control litigation individually or in cooperation with others, and who have an interest in such litigation, are in privity with the parties thereto and are therefore bound by the prior determinations. *Souffront* v. *Compagnie des Sucreries*, 217 U.S. 475; *Lovejoy* v. *Murray*, 3 Wall. 1; *Buzard* v. *Helvering*, 64 App. D.C. 268, 77 F. 2d 391. This rule has been specifically applied to cases in which a stockholder of a corporation controlled litigation in the name of the corporation. *United States Envelope Co.* v. *Transo Paper Co.*, 221 Fed. 79 (D.C. Conn.); *Davidson* v. *I. M. Davidson Real Estate and Investment Co.*, 249 Mo. 474, 155 S.W. 1; *Dishinger* v. *Bon Air Catering, Inc.*, 336 Ill. App. 557, 84 N.E. 2d 562. The findings of control of the litigation by petitioner were not challenged by him in the courts below and are not challenged here. Nor is it seriously contended that petitioner did not have a financial interest in the prior litigation, since it was clear throughout that such litigation was conducted on the theory that he was the sole beneficial stockholder and that any recovery would inure to his benefit.

Since the cause of action asserted by petitioner was admittedly different from that previously asserted by Uebersee, the principles of *res judicata* or collateral estoppel apply only to those issues previously determined. *Partmar Corporation* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89; *Commissioner* v. *Sunnen*, 333 U.S. 591; *Oklahoma* v. *Texas*, 256 U.S. 70. Al-

though the District Court held that the various issues of ownership and control under the usufruct, as well as the enemy status of petitioner, had been directly determined as necessary to its previous judgment, it nevertheless permitted both parties herein to adduce additional evidence on the issues of petitioner's enemy status and enemy taint and as to the value of his severable interest in the property. It was conceded that the issue of valuation had not previously been litigated. The District Court permitted additional evidence on the issues of enemy status and enemy taint in order that the record might be complete (121 F. Supp. 423-424, R. 24-26). Such evidence was adduced and formed the basis of the additional findings of fact (Fdgs. 57-105, R. 72-85).

On the first trial, the District Court had made a detailed finding as to the rights of the respective parties to the usufruct agreement (Fdg. 52, R. 69); in fact, this finding was quoted in full in this Court's previous opinion. This finding, of course, by stating the rights of the usufructuary necessarily delimited the rights of the legal owner, petitioner (Fdg. 100, R. 83). Petitioner asserts that he was denied a trial as to the extent of his rights (pp. 27-28). But what he really contends, as he further states (pp. 28-29), is that he was deprived of an opportunity to show that no usufruct was in fact created. What petitioner seeks, therefore, is an opportunity to prove that there was no valid usufruct—this in the very same action in which it has been adjudicated that such a usufruct existed and gave rise to the enemy taint of Uebersee. The principles of *res judicata* prevent the relitigation of issues thus determined and preclude such legal absurdities.

Petitioner argues, however, that there was no final judgment which could form the basis for the application of *res judicata*. This argument was properly rejected by both courts below. Although this Court vacated the judgment previously under review, it did so only to permit consideration of the rights of petitioner (who was not then a party to the action) and in all other respects affirmed the judgment appealed from (343 U.S. 213). The procedural device of vacating the judgment to permit the intervention of petitioner in no way detracted from this Court's affirmance of the issues litigated by Uebersee and from the conclusive effect of the determination of those issues as affirmed by this Court. It is apparent that the rights of the parties under the usufruct agreement were fully adjudicated and were not merely evidentiary determinations, since without such adjudication neither this Court nor the courts below could have determined, as they did, that the ownership rights and the control exercised by petitioner's parents were so substantial as to constitute enemy taint of Uebersee.[7]

The foregoing statements are equally applicable to the order of the District Court determining that German, and not Swiss, law should be applied in evaluating petitioner's separate interest under the usufruct agreement. In the prior litigation, German law was held applicable to determine the rights of the parties under the agreement. This choice-of-law determination is as binding as a determination of fact. *Oklahoma* v. *Texas*,

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[7] Petitioner argues (p. 31) that in applying *res judicata* the courts below destroyed the distinction between a corporation and its stockholder. *Res judicata* was applied, however, not because petitioner was a stockholder of Uebersee, but because he controlled the prior litigation and had an interest therein.

supra, Southern Pacific R. Co. v. *United States,* 168 U.S. 1; *Mitchell* v. *First Nat. Bank of Chicago,* 180 U.S. 471.

3. Petitioner asserts (pp. 21-27) that he was deprived of the opportunity to establish his right to recovery of interests in the property not subject to the usufruct and seems to argue that he was entitled to 20 per cent of the property. Such a contention is manifestly incorrect. The gift agreement (Pltf. Ex. 5, Pet. App. 11a) provides that the usufruct is reserved to the parents and that 20 per cent of the income received should accrue to petitioner. Such a provision on its face manifestly conferred upon petitioner a right only to income, not to the corpus. In reserving the usufruct in the property, petitioner's parents did not exclude any part thereof and all parties understood that the usufruct extended to all of the property, as is evidenced by the fact that all of the Uebersee shares (except three qualifying shares) were placed in the possession of petitioner's father by the delivery of the key to the safe deposit box. Moreover, this argument was decided adversely to petitioner by the Court of Appeals on the prior appeal (196 F. 2d 560). Petitioner, it is true, has an interest in the usufruct property upon the termination of the usufruct upon the death of his parents, but no more. The evaluation of this future interest was fully litigated by the parties upon the second trial and was the subject of considerable expert testimony on German law.

Under the gift agreement petitioner had a right to 20 per cent of the income received by his parents. Whether this was an *in rem* right or merely a contractual claim against his parents was fully litigated upon the first trial of this action (Former R. 308-311,

315-316, 1328, 1388-1389).[7a] When this action was pending before the Court of Appeals, on appeal from the judgment entered at the conclusion of the first trial, Uebersee filed a motion for clarification of the opinion of the Court of Appeals on several points, including the effect of the provision giving petitioner 20 per cent of the income. In answer to Uebersee's specific request, the Court of Appeals filed a supplemental opinion (196 F. 2d 559-560) based on the record before it, stating that the 20 per cent income provision was a mere contractual claim and not a right *in rem*. This determination was solicited and put in issue by Uebersee in litigation controlled by petitioner, was affirmed by this Court and was, therefore, properly held to be binding on petitioner upon the second trial of this action. Petitioner was thus not deprived of the right to litigate any issues concerning the value of his interests in the property which had not been previously determined.

4. The District Court also determined (a) that petitioner was an enemy ineligible to recover because resident outside the United States and doing business within enemy territory, and (b) that he was an agent of the enemy or of enemy nationals and thus enemy tainted. The Court of Appeals, having determined that petitioner could not recover because he was not an innocent stockholder, deemed it unnecessary to consider the additional findings by the District Court on these issues. They were, however, supported by an abundance of evidence and were manifestly correct. We believe it appropriate to refer to them briefly, since some of them appear to be the basis for petitioner's

[7a] Section 9(a) of the Act permits suit only by those persons claiming an "interest, right or title" invested property. For claims based upon contractual indebtedness, see Section 34 which provides a remedy solely for citizens and residents of the United States.

contention (p. 17) that he has been denied the right of free speech.

The facts set forth in the findings of the District Court and in its opinion established that petitioner, by appointing agents to represent him and to sign in his name on behalf of the Hungarian corporation, Transdanubia Bauxite A.G., was doing business within enemy territory. Petitioner, as has been noted, was instrumental in expediting bauxite production by this Hungarian subsidiary of Uebersee in 1939 and personally negotiated a contract under which substantial amounts of bauxite were to be shipped to Germany in 1940, 1941 and 1942. A state of war between the United States and Hungary came into existence on December 13, 1941 (343 U.S. 209-210; Fdg. 31, R. 65), and, although petitioner was not present in Hungary after that date, the acts of the agents appointed by him to represent him and sign in his name are attributable to him. Such an agency was not terminated by the subsequent state of war. *Sutherland* v. *Mayer*, 271 U.S. 272; *Williams* v. *Paine*, 169 U.S. 55. Petitioner may not escape the legal effect of the apparatus which he himself set in motion merely because he was not within the physical confines of Hungary. The findings of the District Court also established that petitioner was domiciled in Switzerland and was in the United States until his interment in 1942 only as a transient or sojourner with a visitor's visa valid for six months. These facts, together with the evidence of petitioner's associations and activities, demonstrate that he was resident outside the United States and doing business within enemy territory. He was, therefore, an enemy as defined in Section 2 of the Trading with the Enemy Act and was ineligible to recover under Section 9(a).

The District Court also held petitioner ineligible to recover on the basis of the facts found concerning his efforts to preserve the property here in question for the benefit of the German government and his efforts in furthering the interests of Germany and German nationals. We have previously noted the circumstances under which petitioner acquired Liechtenstein citizenship for the duration of the war, with the assurance that he could reacquire German citizenship upon its termination, all for the sole purpose of preventing the United States from seizing the assets here involved and preserving them for the benefit of Germany. We have also noted petitioner's willingness to register as an agent of the German government, his activities in furthering German enterprises and his activities on behalf of German nationals, including his father. All of these facts led the District Court to conclude that petitioner was enemy tainted within the meaning of this Court's first Uebersee opinion (332 U.S. 480) and therefore ineligible to recover. In that opinion, this Court held that the 1941 amendment to Section 5(b) of the Trading with the Enemy Act was designed to cope with new patterns of economic warfare and required the reformulation of the concept of "enemy"; that the definition of enemy contained in Section 2 of the Act must be held to be "merely illustrative, not exclusionary" (332 U.S. 488-489); and that persons or corporations affected with an "enemy taint" were now within the reach of the term "enemy". It is manifest that the District Court correctly applied the principles which this Court previously announced. If we were to accept petitioner's contention (pp. 14-15) that the doctrine of enemy taint may not be applied to individuals, despite the admitted objective of the 1941 amendment to the

Trading with the Enemy Act, the courts of the United States would be powerless to prevent the recovery of vested property by a person who has acquired neutral citizenship merely for the purpose of aiding the enemy and defeating such vesting. Such a construction, which would prevent the United States from taking action against individuals who are giving aid or comfort to the enemy or acting on its behalf and contributing to its resources would plainly, as the District Court stated, "frustrate the intent of Congress" (133 F. Supp. 621, R. 45). On the facts here adduced, petitioner was properly held to be an agent of the enemy and enemy nationals and thus enemy tainted and ineligible to recover.[8]

5. Petitioner asserts that the decisions below raise a constitutional question under the Fifth Amendment, because he is a citizen of a neutral country whose property has been taken without compensation. While the Fifth Amendment requires that friendly aliens be paid just compensation for the confiscation of their property (*Guessefeldt* v. *McGrath*, 342 U.S. 308; *Silesian-American Corp.* v. *Clark*, 332 U.S. 469), the United States, under its war powers, may constitutionally seize or confiscate the property of its enemies or their adherents. *Silesian-American Corp.* v. *Clark*, *supra*; *United States* v. *Chemical Foundation*, 272 U.S. 1; *Miller* v. *United States*, 11 Wall. 268.

Moreover, petitioner's status as a neutral is based upon his Liechtenstein citizenship which was a matter of mere "technical form" (82 F. Supp. 606), and petitioner had no "attachment, patriotism, sentiment, in-

[8] These facts also demonstrate that the case before us involves in reality not a question of the right of free speech; but, actions hostile to the interest of the United States during time of war.

terest or loyalty" to that country (Fdg. 62, R. 73). Under established principles of international law, such citizenship need not be given recognition by the United States. *The Nottebohm Case* (*Liechtenstein* v. *Guatemala*), I.C.J. Reports 1955, p. 4. Deprived of any recognition of that citizenship here, petitioner remains, under our laws, a citizen of Germany whose property may constitutionally be seized.

CONCLUSION

The decision below is clearly correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1957.

APPENDIX

Trading with the Enemy Act, c. 106, 40 Stat. 411, as amended (50 U.S.C. App.):

Sec. 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corpotion, where it has its principal place of business (to which

suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

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